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No. ——

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IN THE

Supreme Court of the United States

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OCTOBER TERM, 1998

SBC COMMUNICATIONS INC., *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "Special Provisions Concerning Bell Operating Companies" of the Telecommunications Act of 1996 —provisions that single out 20 companies alone and by name for disabilities of a type this Court has repeatedly concluded constitutes punishment—violate the Bill of Attainder Clause and the separation of powers.

PARTIES TO THE PROCEEDING

SBC Communications Inc.
Southwestern Bell Telephone Company
Southwestern Bell Communications Services, Inc.
Southwestern Bell Communications Services - Texas, Inc.
Southwestern Bell Internet Services, Inc.
Pacific Bell
Pacific Bell Communications
Nevada Bell
U S WEST Communications, Inc.
Bell Atlantic Corporation
Federal Communications Commission
United States of America
MCI Telecommunications Corp.
American Telephone & Telegraph Corporation
Association for Local Telecommunications Services
Competitive Telecommunications Association
National Cable Television Association
Sprint Communications Company
Telecommunications Resellers Association

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners advise the Court as follows.

SBC Communications Inc., which has shares outstanding in the hands of the public, has the following non-wholly owned subsidiaries which have shares or partnership interests outstanding in the hands of the public: Abilene SMSA Limited Partnership, Amarillo SMSA Limited Partnership, Buffalo Telephone Company, Cellular Mobile Corporation, Champaign CellTelco, Dallas SMSA Limited Partnership, Decatur Cellular Telephone Company, Inc., Eastern Missouri Cellular Limited Partnership, Gainesville Development Associates Limited, Gary Cellular Telephone Company, Kansas City SMSA Limited Partnership, Lubbock SMSA Limited Partnership, McAllen/Edinburgh SMSA Limited Partnership, Midland-Odessa SMSA Limited Partnership, Missouri RSA 8 Limited Partnership, Missouri RSA 9 B1 Limited Partnership, Oklahoma City SMSA Limited Partnership, Oklahoma RSA 3 Limited Partnership, Oklahoma RSA 9 Limited Partnership, PTF/FCLC Associates (LP), PTF/GECC (California) Associates (LP), San Antonio SMSA Limited Partnership, SBMS Cellular Telecommunications Bloomington, Inc., SBMS Cellular Telecommunications Springfield, Inc., S.T.L.M. Programming Services Limited, St. Joseph SMSA Limited Partnership, Texas RSA 9B4 Limited Partnership, Texas RSA 10B1 Limited Partnership, Texas/Illinois Cellular Limited Partnership, Topeka SMSA Limited Partnership, Washington/Baltimore Cellular Limited Partnership, Wichita SMSA Limited Partnership, and Worcester Telephone Company.

On April 1, 1997, SBC Communications Inc., Pacific Telesis Group ("PAC"), and SBC Communications (NV) Inc., a wholly owned subsidiary of SBC Communications Inc., completed an agreement and plan of merger by the means of which PAC and SBC Communications (NV)

Inc. were merged into PAC, and PAC became a wholly owned subsidiary of SBC Communications Inc. PAC, formerly a publicly held corporation, and its wholly owned subsidiaries, Pacific Bell and Nevada Bell, provide telecommunications services subject to the general jurisdiction of the Federal Communications Commission.

Southwestern Bell Telephone Company, Southwestern Bell Communications Services, Inc., Southwestern Bell Communications Services-Texas, Inc., Southwestern Bell Internet Services, Inc., Pacific Bell, Pacific Bell Communications, and Nevada Bell, which are all subsidiaries of SBC Communications Inc., have no nonwholly owned subsidiaries. Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell have publicly held debt.

U S WEST, Inc. has no parent companies or nonwholly owned subsidiaries.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

SBC Communications Inc., U S WEST, Inc., and the SBC subsidiaries identified below [1] petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-53a) is to be reported at 154 F.3d 226. The district court's opinion granting summary judgment in favor of SBC Communications and the other plaintiffs (Pet. App. 54a-73a) is reported at 981 F. Supp. 996.

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[1] The SBC subsidiaries that are petitioners here are Southwestern Bell Telephone Company, Southwestern Bell Communications Services, Inc., Southwestern Bell Communications Services-Texas, Inc., Southwestern Bell Internet Services, Inc., Pacific Bell, Pacific Bell Communications, and Nevada Bell.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Bill of Attainder Clause (Art. I, § 9, Cl. 3) of the United States Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed."

The relevant portions of the statute at issue here, the Telecommunications Act of 1996, are reproduced at Pet. App. 78a-144a.

STATEMENT OF THE CASE

A. Introduction.

A sharply divided panel of the Fifth Circuit has issued a decision of far-reaching importance on an issue that goes to the heart of our Nation's constitutional separation of powers.

The Framers understood that Congress, as a representative body susceptible to popular clamor, should not be allowed to enact punitive legislation based on individualized judgments about particular private parties—that some individuals or groups are good, while others are bad; that some will follow the law, while others will break it unless subjected to special forms of coercion or deterrence. Accordingly, the Constitution—and, in particular, the Bill of Attainder Clause—requires that, when Congress imposes burdens, it must do so through rules applicable to all parties that exhibit the same specified characteristics. It is the job of the *other* Branches to apply those rules to determine which individuals possess those characteristics. As this Court first explained nearly two centuries ago, "[i]t is the peculiar province of the legis-

lature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). By ensuring that Congress acts only by "set[ting] forth a generally applicable rule" imposing disabilities on all parties who engage in the same conduct (*United States v. Brown*, 381 U.S. 437, 450 (1965)), the Bill of Attainder Clause serves as "a general safeguard against legislative exercise of the judicial function" (*id.* at 442).

For more than 200 years, Congress has largely abided by this constitutional constraint. Never before has it singled out named companies to forbid them, and them alone, from engaging in otherwise lawful lines of business. But Congress did just that in the "Special Provisions Concerning Bell Operating Companies" (47 U.S.C. §§ 271-275), passed as part of the Telecommunications Act of 1996 ("the 1996 Act"). These "Special Provisions" do not set forth *any* generally applicable criteria governing which private entities may provide telecommunications services. Rather, the Special Provisions *single out 20 Bell operating companies by name on the face of the statute*, and forbid that closed class of companies—and no other entities—from engaging in otherwise lawful lines of business, including the $70 billion long distance market. The disabilities imposed by the Special Provisions—disabilities that "bar[] designated individuals or groups from participation in specified employments"—are precisely the type that, for more than a century, this Court has held to be flatly "impermissible" under the Attainder Clause. *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 474 (1977); *see Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1867); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377 (1867); *United States v. Lovett*, 328 U.S. 303, 316 (1946); *Brown*, 381 U.S. at 447-48.

In the teeth of these precedents, a two-judge majority of a Fifth Circuit panel concluded that Congress's decision

to single out the Bell operating companies by name for these burdens did not violate the separation of powers principles embodied in the Attainder Clause. In the process, the panel majority transformed the Bill of Attainder Clause from a robust protection against legislative usurpation of the judicial role into an amorphous standard that provides no real limit on congressional power. As the panel majority understood the issue, the Constitution gives Congress free rein to impose any burdens it desires on named entities so long as a court can later discern a "prophylactic" purpose for that decision—whenever, that is, a court concludes that Congress's collective "intent" was to constrain those particular parties' supposed *future* proclivities, rather than to address their past acts. *See* Pet. App. 18a-19a.

The Fifth Circuit's decision merits this Court's review for several reasons.

First, the court of appeals has radically reinterpreted Attainder Clause jurisprudence in a way that drains that clause of nearly all meaning. Almost any statute penalizing named persons could be defended as an attempt to prevent misdeeds in the future. Ironically, the more innocent the target—the fewer findings of past misbehavior—the easier it would be to frame the punishment as "prophylactic." Congress would be free to single out unpopular companies, groups, and even individuals for special disabilities, so long as Congress (or a court purporting to divine Congress's intent) could articulate a forward-looking reason for the restriction. Even a paradigm case of an attainder—for instance, banning named individuals from government employment based on congressional suspicion of Communism—could be justified as designed to protect the public from subversive activities. That is itself a subversion of the Attainder Clause, which was intended to be a fundamental structural limitation on congressional power.

Second, the panel majority frankly acknowledged confusion concerning the decisions of this Court. *See, e.g.,* Pet. App. 41a n.30 (stating that, like a "Christmas pie," this Court's opinions "provide a little something for every taste"). Uncertainty in the lower courts is further demonstrated by the fact that both the Fifth Circuit here and the D.C. Circuit in a related case were sharply divided as to the meaning of this Court's Bill of Attainder Clause precedents and their application to the Special Provisions. *See BellSouth Corp. v. FCC,* 144 F.3d 58 (D.C. Cir. 1998) (petitions for rehearing pending) (upholding the Special Provisions' electronic publishing restrictions over Judge Sentelle's dissent on Bill of Attainder Clause grounds). The Court should review this case to provide the lower courts—and Congress—with needed guidance as to the rules governing the legislature's ability to impose burdens on a targeted few.

Third, the Fifth Circuit's conclusion that the Special Provisions pass constitutional muster is important in and of itself. As this Court has emphasized, the 1996 Act is "an unusually important legislative enactment." *Reno v. ACLU,* 117 S. Ct. 2329, 2337 (1997). The statute overhauls one of our Nation's most important industries at a time of enormous change and growth in the communications marketplace. There is a significant national interest in ensuring that the 1996 Act is constitutionally sound and does not improperly deprive consumers of the benefits of allowing some of our Nation's largest and best run communications companies to compete in highly important markets. That interest is at least as substantial as those that prompted the Court to grant review as to the purely statutory issues raised by a Federal Communications Commission ("FCC") Order implementing other parts of the 1996 Act. *See AT&T Corp. v. Iowa Utilities Board,* Nos. 97-826 *et al.*

B. Regulatory Background.

1. In 1982, AT&T and the United States agreed to settle a long-pending antitrust suit alleging that AT&T had used its purported strategic "bottleneck" over local telephone service to monopolize the long distance and telecommunications equipment markets. The resulting AT&T Consent Decree (as it is referred to in the 1996 Act) required AT&T to divest itself of 20 Bell operating companies (or "BOCs") that provide local telephone service to much of the Nation. For purposes of that divestiture, the BOCs—who were not themselves defendants to the lawsuit—were grouped into seven unaffiliated companies known as Regional Bell Operating Companies (or "RBOCs"). SBC and U S WEST are RBOCs.

The AT&T Consent Decree reflected no findings of guilt, nor did it affect the BOCs' exclusive franchises to provide local service in at least some part of nearly every State. However, precisely because the BOCs' state franchises gave them alleged "bottleneck" power over local exchange facilities, the Decree precluded the BOCs from engaging in certain other lines of business, including long distance telecommunications, information services, and the manufacture of telecommunications equipment. But none of those limitations was intended to be permanent.[2] In fact, the federal district court that oversaw the Decree lifted many of these restrictions in the years after the Decree's approval, and had pending before it a motion to vacate the remaining restrictions at the time the 1996 Act was passed.

2. On February 8, 1996, President Clinton signed the 1996 Act into law. A major purpose of the statute was to deprive local telephone companies of their exclusive franchises and to open all local telecommunications markets to competition. In so doing, the 1996 Act eliminated

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[2] *See United States v. AT&T*, 552 F. Supp. 131, 225 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

the basic premise of the line-of-business restrictions in the AT&T Consent Decree: that the BOCs have a franchised "bottleneck" monopoly.

As the Court is aware from its review in *Iowa Utilities Board*, one of the 1996 Act's most fundamental changes is the establishment of a comprehensive statutory scheme designed actively to encourage local competition. New sections 251 through 253 of the Communications Act preempt state and local regulations that would prohibit new competitors from entering the local exchange markets; mandate the opening of local exchange facilities to competitors; and require *all 1,300 incumbent local exchange carriers* (or "incumbent LECs")—including the 20 BOCs—to assist competitors that wish to use the incumbents' existing local exchange networks to provide their own local exchange service.[3] Taken together, these obligations eliminate any vestige of the local "bottleneck" by requiring incumbent LECs to dedicate portions of their local telephone networks for the exclusive use of competitors seeking to enter that market.

With elimination of the local exchange bottleneck came elimination of the AT&T Consent Decree. In section 601 (a)(1) of the 1996 Act, Congress directed that "[a]ny conduct or activity that was . . . subject to any restriction or obligation imposed by the AT&T Consent Decree" shall no longer be subject to that Decree, but shall instead be subject to the restrictions and obligations of the Act. Pub. L. No. 104-104, § 601, 110 Stat. 143, 47 U.S.C. § 152 note. The district court that had entered the De-

[3] In particular, new section 251(c), 47 U.S.C. § 251(c), requires each incumbent LEC: (1) to allow competitors to interconnect their own networks to those of the incumbent; (2) to provide competitors with access to "unbundled network elements"—individual pieces of the LEC's network—at reasonable and nondiscriminatory rates, terms, and conditions; and (3) to offer to competitors at wholesale rates all the complete telecommunications services currently offered at retail by the incumbent LEC, so that the competitors may then resell those services.

cree accordingly vacated it shortly after the Act became law. *See United States v. Western Elec. Co.*, 1996-1 Trade Cas. (CCH) ¶ 71,364 (D.D.C. Apr. 11, 1996).

3. For the overwhelming majority of the Nation's 1,300 incumbent LECs, Congress stopped at mandating open access to their local exchange facilities. For the 20 BOCs, however, Congress went much further and enacted statutory provisions without precedent in our constitutional history. In the "Special Provisions Concerning Bell Operating Companies," Congress singled out these 20 companies—alone and by name—for additional restrictions that prevent them from competing in otherwise lawful lines of business. *See* 47 U.S.C. § 153(4) (defining the term "Bell operating company," to which the Special Provisions apply, as any of the 20 named companies).

First, new section 271 of the Communications Act prohibits the BOCs from offering long distance services to customers in any State where they have any local exchange operations whatsoever (however limited). A BOC may not escape that prohibition in any State unless and until the FCC determines that the BOC has, among other things, satisfied an onerous 14-point "competitive checklist." 47 U.S.C. § 271(d)(3). The FCC has granted no such approvals in the more than 2½ years since the 1996 Act was passed.[4] Even after the FCC ultimately grants such relief, moreover, the statute authorizes that

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[4] Just days ago, the FCC issued yet another order rejecting a BOC's application to provide long distance service and, in so doing, promulgated 140 pages of detailed requirements a BOC must satisfy to meet the FCC's understanding of section 271's requirements. Memorandum Opinion and Order, *Application of BellSouth Corp., BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, FCC 98-271 (rel. Oct. 13, 1998). Even after obtaining a favorable determination by the FCC, the BOCs still may not offer long distance services themselves; for at least three years, such services may be provided only by corporate affiliates that meet strict and costly structural separation requirements. *See* 47 U.S.C. § 272.

agency to withdraw long distance authority at any time. *Id.* § 271(d)(6).

Second, new section 273 prohibits any BOC from manufacturing and selling telecommunications equipment for as long as it is prohibited from providing long distance services throughout its own region under section 271. *Id.* § 273(a). Additionally, a BOC may *never* engage in any manufacturing joint venture with another BOC or BOC affiliate, even if long distance authority is granted. *Id.*

Third, new section 274 provides that, for four years, a BOC may not directly engage in "electronic publishing" (which includes providing materials such as news, editorials, and literature) that is disseminated by means of the BOC's basic telephone service. *Id.* § 274. Prior to passage of the 1996 Act, the BOCs engaged in electronic publishing without restriction. *See United States v. Western Elec. Co.,* 993 F.2d 1572 (D.C. Cir.), *cert. denied,* 510 U.S. 984 (1993).

Fourth, new section 275 prohibits the BOCs from providing alarm monitoring services—even through a separate affiliate—for five years. 47 U.S.C. § 275. Again, prior to passage of the 1996 Act, the BOCs had been free to engage in alarm monitoring. *See United States v. Western Elec. Co.,* 767 F. Supp. 308 (D.D.C. 1991), *aff'd,* 993 F.2d 1572 (D.C. Cir.), *cert. denied,* 510 U.S. 984 (1993).

C. Proceedings Below.

1. SBC, joined by intervenor U S WEST, brought this lawsuit so that they could operate their businesses under the same rules that now apply to each of the more than 1,300 other incumbent LECs. This suit does not challenge the provisions of the 1996 Act that fundamentally restructure the telecommunications industry by eliminating exclusive local franchises and requiring *all* incumbent

LECs to allow competitors to use the incumbents' own networks to compete for local telephone customers. Onerous as those provisions are, they are rules of general applicability. Rather, SBC and U S WEST challenge *only* the Special Provisions—statutory sections that prohibit the named BOCs, and those companies alone, from competing in valuable and growing markets.

The district court agreed with SBC and U S WEST that the Special Provisions violate the Bill of Attainder Clause and the separation of powers. Emphasizing that the Special Provisions are "extraordinary, and in fact unprecedented" in our constitutional history (Pet. App. 64a), the district court concluded that, under an abundance of precedent from this Court, those provisions "necessarily constitute punishment" because they single out specific private parties and "prevent[] [them] from engaging in a profession or business" (*id.* at 66a).

The district court specifically rejected the notion that the Special Provisions are permissible because they were a prophylactic measure based on Congress's "predictive determination" about the BOCs' likely conduct if permitted to enter new markets. The court observed that, under this Court's decisions, "[p]unishment is not restricted to past deeds," but "may include deprivations designed to prevent future misconduct." *Id.* at 72a (citing *Brown*, 381 U.S. at 458-59). Indeed, to the district court, the government's central contention that " 'maybe [the BOCs] weren't criminals in the past but we know they will be in the future' " actually "helps make the case for the restrictions being a bill of attainder." *Id.*

2. A divided panel of the Fifth Circuit reversed the district court's judgment. The panel majority suggested that the standard for demonstrating an Attainder Clause violation is a "question of some historical and doctrinal complexity." Pet. App. 14a. In the majority's view, the key to this area of the law is a "subtle analysis" growing

out of *dissents* in the two Nineteenth Century cases (*Cummings* and *Garland*) in which the Court held that preventing private parties from pursuing lawful employment *was* punishment within the meaning of the Attainder Clause. *Id.* at 18a.

According to the Fifth Circuit panel majority, those dissents, as well as subsequent concurring opinions, and majority opinions in cases in which no private party was even singled out for a disability, established a "prophylactic exception" to the Attainder Clause bar. *Id.* at 18a-22a. Under that exception, Congress may explicitly single out specific, and even named, private parties for burdens historically understood to be punishment so long as a reviewing court later determines that Congress enacted such a statute to prevent future misconduct. *See id.* at 29a.

Applying that test here, the majority concluded that Congress passed the Special Provisions not as retribution for the BOCs' supposed prior bad acts, but to prevent those 20 companies from acting unlawfully in the future. In reaching that conclusion, the majority emphasized that the Special Provisions serve the prophylactic purpose of "ensur[ing] fair competition" in certain telecommunications markets by addressing the "substantial risk that the [BOCs] will use the same anticompetitive techniques used by AT&T in order to thwart the growth of their own competitors" (*id.* at 32a); that the 1996 Act's legislative history revealed no " 'smoking gun' " establishing punitive intent (*id.* at 33a); and that the Special Provisions were "part of a larger quid pro quo" contained in the 1996 Act (*id.*).

Judge Smith dissented from the majority's attempt to "redefine[] our traditional understanding of the [Attainder Clause's] mandate." *Id.* at 53a. He emphasized that a "prophylactic exception" to the Attainder Clause would eviscerate the important separation of powers protections afforded by that provision. *See id.* at 49a (stressing that,

under the majority's theory, "a statute that sentences to death a named individual who announces that he has criminal tendencies . . . but has yet to commit a crime . . . is not a bill of attainder"). In any event, the majority's creation of such an exception "flatly contradicted" this Court's decisions. *Id.* at 48a (citing *Brown*, 381 U.S. at 458-59). Applying more traditional principles to this case, Judge Smith concluded that the Special Provisions are unlawful because "the unbroken line of Supreme Court precedent" (*id.* at 50a) holds that "bars to employment constitute punishment for purposes of the Bill of Attainder Clause" (*id.* at 42a (citing, among other cases, *Garland, Cummings, Brown,* and *Lovett*)).

REASONS FOR GRANTING THE PETITION

THIS CASE RAISES IMPORTANT QUESTIONS REGARDING THE LIMITS OF CONGRESS'S AUTHORITY IN THE CONTEXT OF AN EXCEPTIONALLY SIGNIFICANT STATUTE.

A. The Court Should Grant Review Because the Fifth Circuit's Analysis Eviscerates a Fundamental Structural Limitation on Congressional Authority.

1. *The Special Provisions Violate the Bill of Attainder Clause.*

A key aspect of our "constitutional equilibrium" is the separation of "the legislative power to make general law" from "the judicial power to apply that law in particular cases." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 224 (1995); *see id.* at 219 ("The Framers of our Constitution lived among the ruins of a system of intermingled legislative and judicial powers."); Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1176 (1989) ("Executives and judges handle individual cases; the legislature generalizes."). As Justice Story explained, "[t]he first maxim . . . of a free state is, that the laws be made by one set of men, and administered by another; in other words, that the legislative and judicial characters be kept

separate. When these offices are united in the same person or assembly, particular laws are made for particular cases, springing oftentimes from partial motives, and directed to private ends." 2 J. Story, *Commentaries on the Constitution of the United States* § 521, at 5 n.1 (1833) (internal quotation omitted). *See INS v. Chadha*, 462 U.S. 919, 960 (1983) (Powell, J., concurring in the judgment) ("When Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers.").[5] James Madison similarly declared that legislation imposing disabilities on a named few was "contrary to the first principles of the social compact, and to every principle of sound legislation." *The Federalist* No. 44, at 282 (Rossiter ed. 1961). And Alexander Hamilton warned that, if the legislature may target individual persons, "no man can be safe, nor know when he may be the innocent victim of a prevailing faction." Letter from Phocion (Jan. 1784), *reprinted in* 3 *The Founders' Constitution* 346 (Kurland & Lerner eds. 1987).

The Bill of Attainder Clause reflects the categorical constitutional judgment that Congress is an inappropriate tribunal to decide that particular individuals or entities warrant punishment. The Clause accordingly ensures that, where Congress seeks to impose a disability, it acts *only* by "set[ting] forth a generally applicable rule" governing the conduct of all parties that possess particular traits, not by simply specifying the individual parties that

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5 Law . . . must be not a special rule for a particular person or a particular case, but . . . "the general law . . ." so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, . . . and other similar special, partial, and arbitrary exertions of power under the forms of legislation.

Hurtado v. California, 110 U.S. 516, 535-36 (1884).

it believes should be subject to the disability. *Brown*, 381 U.S. at 450. *See id.* at 454 n.29 (under the Attainder Clause, "a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics"); *Plaut*, 514 U.S. at 241 (Breyer, J., concurring in the judgment) ("[T]he authoritative application of a general law to a particular case by an independent judge, rather than by the legislature itself, provides an assurance that even an unfair law at least will be applied evenhandedly according to its terms.").

In accord with these deeply rooted principles, this Court has determined that a federal statute violates the Attainder Clause anytime it (1) "singles out" private parties (2) for "punishment" without a judicial trial. *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846 (1984). The Special Provisions satisfy both criteria.

First, there is no dispute that the "Special Provisions Concerning Bell Operating Companies" single out the BOCs. *See* Pet. App. 64a ("The parties do not, and cannot, dispute that the specification element is met."). That point is plain from the face of the statute. There are more than 1,300 LECs in the United States, but the Special Provisions apply to only 20 such companies, which are identified by name, not by economic or technological characteristics. *See* 47 U.S.C. §§ 153(4), 271-275.

Nor can there be any dispute that excluding individuals or groups from engaging in a particular profession or business constitutes "punishment" under the Bill of Attainder Clause. Indeed, "legislative enactment[s] barring designated individuals or groups from participation in specified employments or vocations" have been a primary focus of the Bill of Attainder Clause. *Nixon*, 433 U.S. at 474. *See also Selective Serv.*, 468 U.S. at 852 ("the list

of punishments forbidden by the Bill of Attainder Clause . . . include[s] legislative bars to participation by individuals or groups in specific employments or professions"); *Brown*, 381 U.S. at 448 (" '[d]isqualification from the pursuits of a lawful avocation' " constitutes punishment) (quoting *Cummings*, 71 U.S. (4 Wall.) at 320); *Lovett*, 328 U.S. at 316 (permanent bar on government employment "is punishment, and of a most severe type"). As long ago as 1867, this Court explained that "exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. . . . *All* enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder." *Garland*, 71 U.S. (4 Wall.) at 377 (emphasis added).

2. *The Fifth Circuit's Creation of a "Prophylactic Exception" Conflicts With Precedent and Nullifies the Structural Protections Provided by the Attainder Clause.*

Rather than disputing that the kind of restriction imposed by the Special Provisions—preventing the BOCs from pursuing otherwise lawful business opportunities—has historically been understood to fall under the rubric of punishment when imposed on named individuals, the Fifth Circuit created a "prophylactic exception" to the Attainder Clause prohibition. Under that exception, Congress may single out a handful of private parties by name for a restriction that has historically been understood to be "impermissible" (*Nixon*, 433 U.S. at 474), so long as a reviewing court later determines that Congress was motivated not to exact retribution for past transgressions, but to prevent future misdeeds. Pet. App. 19a ("[A] properly crafted prophylactic measure [can] survive attainder analysis, even where the finding of a propensity for future conduct was based solely on past acts, and the result was a bar from future employment.").

The Fifth Circuit's analysis is contrary to this Court's decisions. It is also thoroughly unsound insofar as it replaces a straightforward, historically grounded analysis with a free-wheeling approach based on legislative history that provides no meaningful limit on congressional authority and no certainty in this important area of constitutional adjudication.

a. The Attainder Clause's fundamental structural limitation on congressional power has never depended—and should not depend—on whether a statute that singles out particular parties for abuse was somehow "meant" by Congress as prophylaxis, not retribution. The Framers were thoroughly familiar with supposedly "prophylactic" bills of attainder. Indeed, the anti-Tory attainders passed during the Revolution were frequently justified as preventative. *See* John Hart Ely, Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause,* 72 Yale L.J. 330, 339 (1962) ("historical examples demonstrate that the primary purpose of some pre-Constitution bills of attainder was to prevent certain types of future action on the part of the individuals attainted").[6] Having ample firsthand knowledge of such legislative excesses, the Framers acted unanimously to

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[6] For example, the infamous New York loyalty oath requirement of July 3, 1778, recited that it was adopted "more effectually to prevent the mischiefs arising from the influence and example of persons of equivocal and suspected character." Thompson, *Anti-Loyalist Legislation During the American Revolution,* 3 Ill. L. Rev. 147, 153 (1908). More generally, each of the 13 colonies adopted anti-loyalist legislation typically citing allegedly regulatory purposes such as protecting the "public safety." *See, e.g.,* Reppy, *The Spectre of Attainder in New York,* 23 St. John's L. Rev. 1, 22 (1948). The laws were generally "forward-looking" measures that contained loyalty oath exceptions permitting Tories to avoid punishment if they would agree in the future not to support the Crown. *Id.* at 27, 29; *see also* Thompson, *supra,* 3 Ill. L. Rev. at 147, 148, 150, 153, 159, 161. "The fact that many of the statutes were repealed as soon as the war—and therefore the Tory danger—was ended lends credence to the view that their purpose was not primarily retribution for past misdeeds." Ely, *supra,* 72 Yale L.J. at 338 n.66.

ensure that they would never recur. *See* J. Madison, *Debates in the Federal Convention of 1787*, at 449 (Hunt & Scott eds. 1920).

In accord with the Framers' understanding, this Court has consistently rejected the proposition that attainders are permissible so long as they serve a prophylactic purpose. Indeed, the Court has declared that it would be "archaic" to "limit the definition of 'punishment' to 'retribution.'" *Brown*, 381 U.S. at 458. "[L]egislative intent to encourage compliance with the law does not establish that a statute is merely the legitimate regulation of conduct." *Selective Serv.*, 468 U.S. at 851. Thus, "[p]unishment is not limited solely to retribution for past events, but may involve deprivations inflicted to deter future misconduct." *Id.* at 851-52; *see also Nixon*, 433 U.S. at 476 n.40 ("punishment" specifically includes deprivations designed "to prevent . . . future misconduct"); *cf. United States v. Bajakajian*, 118 S. Ct. 2028, 2034 (1998) (holding that forfeiture was a punitive measure under the Excessive Fines Clause even though it could be fully explained in terms of deterrence). After all, "[o]ne of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *Brown*, 381 U.S. at 458.

Allowing Congress to avoid the categorical constitutional prohibition on bills of attainder by artful drafting of preambles and committee reports would render the prohibition all but meaningless. Every law that this Court has held to be an unconstitutional attainder could be—and, in fact often was—defended as a rational attempt to prevent against future misconduct. In *Lovett*, for example, the three individuals who Congress precluded by name from government service because of their alleged Communist sympathies were ostensibly barred because their "tendencies made their continued employment dangerous to the national welfare" (*Brown*, 381 U.S. at 460)—just

as in this case the government has asserted that the "tendencies" of the BOCs may be dangerous to future competition. Nevertheless, this Court in *Lovett* had no trouble concluding that the disability imposed on those three named parties was "punishment, and of a most severe type." 328 U.S. at 316. *See also Brown,* 381 U.S. at 456-57 (finding an unlawful attainder despite the government's contention that the law was "enacted for preventive rather than retributive reasons" and "aim[ed] . . . not to punish Communists for what they have done in the past, but rather to keep them from positions where they will in the future be able to bring about undesirable events").

b. The Fifth Circuit's new rule is particularly unfortunate because it replaces the clear and historically rooted test that has long been the touchstone of this Court's analysis—and that afforded both Congress and the public the certainty of a categorical rule—with an impressionistic and manipulable inquiry into whether the Legislature as a whole "really" intended to exact retribution or to prevent future harm. From its earliest days, the Court has recognized that determining the intent of a collective legislature is a perilous enterprise. *See, e.g., Fletcher v. Peck,* 10 U.S. (6 Cranch) at 130; *City of Philadelphia v. New Jersey,* 437 U.S. 617, 626 (1978); *Palmer v. Thompson,* 403 U.S. 217, 224-25 (1971).

Undertaking such an inquiry is doubly misguided in this context, where it would be a mechanism for sanctioning a kind of legislation—legislation targeting a closed class of named parties rather than creating a general rule applicable to any party that exhibits certain stated characteristics—for which there is rarely, if ever, a legitimate need. *See Nixon,* 433 U.S. at 486 (Stevens, J., concurring) ("[T]here is rarely any valid reason for such narrow legislation; and normally the Constitution requires Congress to proceed by general rulemaking rather than by

deciding individual cases."); *Plaut*, 514 U.S. at 242-43 (Breyer, J., concurring in the judgment) (emphasizing the "Framers' 'concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person' ") (quoting *Chadha*, 462 U.S. at 962 (Powell, J., concurring in the judgment)).

c. The practical consequences of the Fifth Circuit's novel approach to the Attainder Clause extend far beyond the parties now before this Court. As the American Civil Liberties Union has explained, if this legislation is upheld, "[t]here is simply no valid limiting principle that would prevent Congress from utilizing this tool to target other corporations, other groups, and other individuals in the future." Brief of the San Antonio Chapter of the ACLU as Amicus Curiae at 12 (5th Cir. filed Apr. 21, 1998). Anyone who fell afoul with Congress could be subjected to punishing burdens under the guise of prophylaxis.

In the economic sphere alone, under the Fifth Circuit's decision, Congress would have *carte blanche* to enact legislation that sets out no general rule but rather directs that Microsoft, Philip Morris, or some other victim of popular clamor should be deprived of its rights. All that would be necessary to uphold such a statute would be to convince a court that there was some ostensible prophylactic reason for the legislation. And it would be easy enough to show, for instance, that it was rational to single out Microsoft for restrictions in order to give other companies a fair opportunity to compete in the Internet browser market. Under the Fifth Circuit's analysis, the only limit on Congress's power to impose disabilities on specifically targeted entities without the protections of a judicial trial—precisely the practice this Court has long understood to be "too dangerous to liberty to exist in [a] nation of free men" (*Lovett*, 328 U.S. at 318)—would be the legislative imagination.[7]

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[7] As the ACLU correctly noted, "[t]o approve the Special Provisions, and thereby give sanction to the type of legislation they

On the other hand, adherence to the time-tested rule that Congress may *not* impose historically forbidden punishments on a hand-picked few does not hamstring Congress's ability to enact legitimate regulatory legislation. Congress remains free to impose severe restrictions to protect the Nation's well-being. Where Congress does so, however, it must enact a general rule; it may not impose a punitive restriction only on named parties. In the field of economic regulation, for instance, the Glass-Steagall Act's prohibition on all commercial banks from engaging in investment banking raises no constitutional question. By contrast, no one would reasonably suggest that Congress could lawfully prohibit Bank of America, Citibank, and NationsBank alone and by name from engaging in such activities, however rational such a law might be. *See also Nixon*, 433 U.S. at 485 (Stevens, J., concurring) (even where it is permissible to deprive a class of a benefit, "it would surely be a bill of attainder for Congress to deprive a single, named individual of the same benefit").

Applied to this case, these principles dictate that Congress was free to enact, as it did, stringent market-opening requirements that it imposed on all 1,300 incumbent LECs. Congress was also free to enact, though it did not, a general rule precluding all incumbent LECs (or some neutrally defined subset thereof) from providing long distance services.[8] But Congress could not lawfully inflict

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exemplify, would also threaten to usher in a new and uniquely vindictive form of interest group politics. . . . [T]he requirement that legislation impose its burdens categorically, and not specifically, serves as a check on manipulation of th[e] legislative process. The prospect that participants in the political process might now seek to impose on their rivals, by name, special disabilities, raises the specter of a uniquely vindictive brand of lobbying effort. This type of law-making simply has no place in our democratic system." ACLU Brief at 14-15.

[8] Apparently, Congress made the judgment that the market-opening requirements in sections 251 and 252 of the Act, as well as numerous other generally applicable regulatory restrictions, were sufficient to permit entry into long distance by all LECs other than

that disability (and the others found in the Special Provisions) only on 20 disfavored companies identified by name, based on a legislative determination that those companies are uniquely likely to behave anticompetitively. *See, e.g., McFarland v. American Sugar Ref. Co.*, 241 U.S. 79, 85 (1916) (Holmes, J.). And Congress may not target the BOCs (or any other private parties) by name for such disfavored treatment, *whether or not* one could hypothesize a prophylactic reason to subject only those companies to the disabilities. *See Brown*, 381 U.S. at 449 n.23 ("We think it clear from the Lovett opinion that [the challenged statute] would have been voided even if it could have been demonstrated that no one other than Lovett, Watson and Dodd possessed the characteristics which Congress was trying to reach."). Even if Congress could have fashioned a prophylactic measure, written in generic terms, that would have covered only the BOCs, the fact is that Congress did not do so.[9] It simply designated the BOCs by name. In this context, such constitutional forms matter a great deal.

Accordingly, the Fifth Circuit's suggestion that it was "rational" for Congress to single out the BOCs (Pet. App. 33a), from among 1,300 LECs, because of their "inherent and natural potential to restrain competition" (*id.* at 40a), is particularly offensive to this Court's Attainder Clause jurisprudence. As Judge Sentelle of the

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the BOCs. If the Special Provisions are struck down, these other regulatory restrictions will continue to apply to all LECs, including the BOCs.

[9] It would in fact have been extremely difficult if not impossible to craft a generally applicable rule that would cover the BOCs but no other incumbent LECs. That is true because, among other things, 20 non-BOC LECs were larger (in terms of local telephone lines served) than the smallest BOC (Nevada Bell) at the time the 1996 Act was passed. FCC, *Statistics of Communication Common Carriers, 1995-96*, at 11 (Table 2.1). Even within Nevada, moreover, Nevada Bell has only 28 percent of the lines in the State; Sprint serves many more customers in Nevada, including the State's most important and densely populated urban area, Las Vegas.

D.C. Circuit explained in a similar case, "[i]t is one thing for the legislature to attempt to protect competition by defining a standard against which the conduct of individuals can be measured. It is quite another for it to simply list the names of individuals who Congress perceives as having uncontrollable monopolistic tendencies. This short-circuits the due process protections of trial in an Article III court, and therefore runs afoul of the structural provisions embodied in the Constitution's Bill of Attainder Clause." *BellSouth*, 144 F.3d at 74 (Sentelle, J., dissenting).

d. The Fifth Circuit discerned an imaginary "prophylactic exception" to the Bill of Attainder Clause because it failed to see the difference between a statute that neutrally defines a class and a statute that applies to a few named parties.[10] The panel cited, in support of its prophylatic exception, cases involving statutes that imposed open-ended, generally applicable qualification requirements, without any singling out. *See, e.g., De Veau v. Braisted*, 363 U.S. 144 (1960) (prohibiting all convicted felons from holding certain labor union offices); *Hawker v. New York*, 170 U.S. 189 (1898) (prohibiting felons from practicing medicine); *Dent v. West Virginia*, 129 U.S. 114 (1889) (prohibiting practice of medicine absent certification of medical college attendance or ten years of practice).[11] These cases show only that Congress

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[10] A very similar error is at the heart of the majority opinion in the D.C. Circuit's *BellSouth* case. There, the court of appeals emphasized that section 274, the provision barring BOCs from providing electronic publishing services, was ordinary legislation "apart from its specific targeting aspect." 144 F.3d at 65. As Judge Sentelle properly stressed in dissent there, a bill of attainder analysis that evaluates statutory burdens "apart from [their] specific targeting aspect" is fundamentally misguided. *Id.* at 73. The whole point of the Attainder Clause is to bar Congress from making individualized decisions imposing special burdens on targeted parties.

[11] *See also Brown*, 381 U.S. at 448 n.21 (explaining that statute at issue in *Dent* "set forth general qualifications applicable to all persons who wanted to practice medicine"); *id.* at 460 (explaining

may act prophylactically when it does *not* specifically target its legislation to a closed class of named entities.

The other cases cited by the Fifth Circuit panel majority similarly do not support its holding that Congress may impose a historically recognized punishment on specifically named parties if it acts with a regulatory purpose. In particular, *Nixon*—a decision particularly emphasized by the panel majority—does not bolster that court's conclusion. *Nixon* does not "stand[]" for the proposition that "if legislation has a legitimately nonpunitive function, purpose, and structure, it does not constitute punishment for purposes of the Bill of Attainder Clause, even where it imposes the historically punitive sanction of barring designated individuals from engaging in certain professions." Pet. App. 29a. To begin with, *Nixon* did not involve any sanction at all, much less a "historically punitive" one. Rather, as the Court explained, Congress had specifically provided that President Nixon would receive full compensation for any losses incurred because of the temporary retention of his papers. *Nixon*, 433 U.S. at 475; *see also BellSouth*, 144 F.3d at 73 (Sentelle, J., dissenting) ("[N]ot only did the [*Nixon*] statute fail to inflict any harm previously held to be 'forbidden deprivations,' but its provision for '"just compensation" . . . undercut[] even a colorable contention that the Government has punitively confiscated appellant's property.' ").

Of equal importance, *Nixon* explicitly states that it is flatly "*impermissible*" to impose on a select few burdens that *are* historically recognized to be punitive. 433 U.S. at 474 (emphasis added). Far from supporting the creation of a "prophylactic exception," therefore, *Nixon* affirmed in the clearest possible language that the Constitution imposes a bright-line rule barring Congress from

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that another of the cases cited by the Fifth Circuit majority, *American Communications Ass'n v. Douds*, 339 U.S. 382 (1950), "misread" *Lovett* to the extent it thought that *Lovett* "could be distinguished on the ground that the sanction there imposed was levied for purely retributive reasons").

singling out private parties for historically recognized punishments.

To be sure, after determining that the burden imposed on President Nixon did *not* on its face constitute punishment, the Court in *Nixon* went on to consider whether the burden was nevertheless punitive when viewed as a matter of legislative "function" and "motivation." But the Court's explicit purpose in undertaking these additional inquiries was to determine whether the "checklist of deprivations and disabilities" that constitute punishment should be *expanded*, beyond restrictions such as a bar to engaging in a line of business, to include seizure of the President's papers: "Our treatment of the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee." *Id.* at 475; *see also Selective Serv.*, 468 U.S. at 853 (undertaking these same additional inquiries "[t]o ensure that the Legislature has not created an impermissible penalty not previously held to be within the proscription against bills of attainder"). Thus, as Judge Smith explained in this case, it is "sadly ironic" that the panel majority read these decisions protecting against "congressional creativity in dreaming up new burdens" as authority for *constricting* the Clause's traditional protections. Pet. App. 47a. *See also BellSouth*, 144 F.3d at 73 (Sentelle, J., dissenting) ("[u]nder *Selective Service*, we probably need go no further" than a historical inquiry).[12]

e. Finally, none of the subsidiary arguments relied on by the Fifth Circuit panel majority supports its conclu-

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[12] Not surprisingly, the Fifth Circuit's misunderstanding on this point conflicts with the statements of other courts of appeals. *See Artway v. Attorney General of New Jersey*, 81 F.3d 1235, 1263 (3d Cir. 1996) (Becker, J.) ("[E]ven if some remedial purpose can fully explain the measure," a law is punitive if "a historical analysis show[s] that the measure has traditionally been regarded as punishment"); *Crain v. City of Mountain Home*, 611 F.2d 726, 729 (8th Cir. 1979) (invalidating as bill of attainder an ordinance reducing city attorney's pay to $1 per year).

sion that the Special Provisions can survive scrutiny under the Attainder Clause.

The panel majority explained that "perhaps [the] foremost" reason it believed the Special Provisions were prophylactic was that they did not "impose a perpetual bar." Pet. App. 31a. But not every sentence is a life sentence. This Court has stated unequivocally that "legislative punishment, of *any* form or severity, of specifically designated persons or groups" (*Brown*, 381 U.S. at 447 (emphasis added)) is barred by the Attainder Clause.

Nor does the possibility that the FCC might someday release the BOCs from two of the restrictions—those in sections 271 and 273—save them from being a bill of attainder. This Court has never suggested that a statute is rendered "nonpunitive" if the legislature allows a private party to bring the punishment to an end by complying with conditions imposed by the statute—especially when, as here, the conditions are themselves onerous and indefinite. *See Cummings*, 71 U.S. (4 Wall.) at 324 (statutes that "inflict punishment . . . conditionally," such as a law under which a defendant could avoid punishment by doing "a given act by a named day," " 'come[] precisely within the definition of a bill of attainder' "); Pet. App. 44a (Smith, J., dissenting) ("[T]he Bill of Attainder Clause cannot be avoided simply by inserting into the statute a means of escape. The fact that the federal government holds the key to the [BOCs'] prison is irrelevant.") (citing *Brown*).

Similarly, the Special Provisions do not become constitutional because they were part of a "larger quid pro quo" in the 1996 Act. Pet. App. 33a. First, it is wrong to suggest that the BOCs "asked for" the Special Provisions as a replacement for the AT&T Consent Decree restrictions. SBC repeatedly presented testimony demonstrating that a statutory provision singling out the BOCs for special restrictions would be a bill of attainder and

violate the separation of powers.[13] In any event, as a matter of law, the fact that "a party collaborated with others in seeking legislation has never been understood to estop the party from challenging that legislation in subsequent litigation." *New York v. United States*, 505 U.S. 144, 183 (1992).

Nor can the Fifth Circuit's judgment be defended on the related ground that the BOCs are somehow "better off" under the Special Provisions than under the AT&T Consent Decree. On the contrary, the fact that the Special Provisions readjudicate matters that had already been litigated and consensually resolved in the federal courts simply demonstrates how far Congress has gone here in usurping the judicial role—and violating the separation of powers.

Congress may relieve named parties of judicially imposed burdens, such as those resulting from an injunction running in favor of the government. *See Plaut*, 514 U.S. at 230-31; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 432 (1856). Congress may also change substantive background law. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992); *Wheeling*, 59 U.S. (18 How.) at 429. But basic separation of powers principles prevent Congress from substituting for the judgment of an Article III court a statute on the very same subject imposing superseding restrictions aimed exclusively and specifically at the parties to the litigation. *See Plaut*, 514 U.S. at 223 (separation of powers protects "suits depending or adjudged"); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 & n.13 (1869).

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[13] H.R. Rep. No. 102-850, at 88-94 (1992). Similar testimony was presented by the ACLU. *See* Letter from Morton H. Halperin, Director, ACLU, to the Hon. Jack Brooks, Chairman, House Judiciary Committee, at 3-4 (June 29, 1992). *See also Communications Law Reform: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Commerce*, 104th Cong., 1st Sess. 30 (1995) (statement of Edward Whitacre, Chairman of SBC Communications Inc.) (Special Provisions are "wrong, anticompetitive, counterproductive, and anti-consumer").

Moreover, this Court has never suggested that the existence of collateral benefits can somehow nullify the fact that a particular statutory provision constitutes punishment under the Attainder Clause. Indeed, determining whether, on balance, the benefits conferred by some parts of a statute outweigh the punishments imposed by others would involve comparing incommensurables in a process akin to "judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment). Any such analysis is particularly inappropriate in this context, where it would require the Court to determine whether the future rulings of the particular federal judge who was supervising the AT&T Consent Decree were likely to be more favorable to the BOCs than future rulings of the FCC under the new statutory provisions. Such an analysis is neither possible nor appropriate, and could not in any event save a statute that reimposes two disabilities (those involving electronic publishing and alarm monitoring) that the judiciary had already lifted, that permanently bars the named companies from manufacturing joint ventures, and that indefinitely subjects those companies to the onerous requirements of section 271 before they may obtain long distance authority (authority which can then be revoked at any time, *see* 47 U.S.C. § 271(d)(6)).

B. The Court Should Review This Case To Alleviate the Courts of Appeals' Admitted Confusion as to the Appropriate Bill of Attainder Test Under This Court's Precedents.

As significant as the Fifth Circuit's error in creating a "prophylactic exception" to the Attainder Clause bar is the fact that the court itself was frankly unsure of that ruling.

The panel majority made no secret of the difficulties it experienced in determining the appropriate rule under the Attainder Clause. Judge Jolly, writing for the two-

judge majority, lamented that, "[l]ike a Christmas pie," this Court's opinions "provide a little something for every taste." Pet. App. 41a n.30. He described the panel's analysis as a "sinuous journey" through what the majority understood to be the "diverse expressions and applications" of the Attainder Clause in this Court's cases. *Id.* Indeed, to reach its result, the majority was forced to cast aside one of this Court's major precedents (*Brown*) as "aberrant" (Pet. App. 29a) and to dismiss rigorous adherence to the language of others as "unsensible" and "ritualistic" (*id.* at 30a). The uncertainty reflected on the face of the majority opinion below is reinforced by the fact that federal judges are almost evenly split as to whether this Court's precedents require invalidation of the Special Provisions. Four judges—the majorities in this case and in the D.C. Circuit's *BellSouth* decision—believe that the Special Provisions are constitutional; three judges—the dissenters in both cases and the district judge here—have concluded that the Special Provisions are invalid.[14]

While confusion among the lower courts about the import of this Court's decisions is always undesirable, it is intolerable where, as here, the confusion relates to an issue of foundational importance in our constitutional system. No question faced by the federal courts—and Congress—is more fundamental than where the power of one Branch ends and the authority of another begins. Yet the federal judiciary is plainly unsure of the answers to basic

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[14] As noted above, the D.C. Circuit decision is limited to the constitutionality of the electronic publishing restriction in section 274. Petitions for rehearing are pending in that case. The D.C. Circuit also held argument on September 25, 1998, in a separate case concerning the constitutionality of the long distance restriction in section 271. *See BellSouth Corp. v. FCC*, No. 98-1019 (D.C. Cir.). If the D.C. Circuit ultimately determines that either of those restrictions violates the Attainder Clause, that will provide an important additional reason to grant review in this case. It should be noted that this case involves the validity of sectons 271-275, whereas the D.C. Circuit cases raise the validity of sections 274 and 271, respectively.

questions about the limits imposed by the Attainder Clause, such as whether Congress is free to single out private parties for disabilities if it has a prophylactic purpose. That fact alone warrants immediate consideration of this issue by the Court, to ensure stability and provide predictability to officials in all Branches of our government. *See City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (reviewing question regarding the scope of congressional authority to enact a specific kind of statute even though the courts of appeals were in agreement on that point); *cf. Clinton v. City of New York*, 118 S. Ct. 2091, 2108-09 (1998) (Kennedy, J., concurring) ("The Constitution's structure requires a stability which transcends the convenience of the moment.").

C. The Court Should Review This Case Because the Constitutionality of the Special Provisions Is a Matter of Pressing National Importance in Itself.

It is common ground here that the 1996 Act is "an unusually important legislative enactment." *Reno v. ACLU*, 117 S. Ct. 2329, 2337 (1997). Indeed, both the government and the long distance incumbents (who seek, by defending the Special Provisions, to protect against BOC competition in their markets) have repeatedly trumpeted the unique and overriding significance of this statute. As many of those parties jointly told the Court in seeking certiorari in *Iowa Utilities Board*, the 1996 Act is "landmark" legislation that "overhaul[s]" the regulatory scheme governing the telephone networks that "affect every home and business in the United States and are critical to the national economy." Petition for a Writ of Certiorari at 1, 11, *AT&T Corp. v. Iowa Utils. Bd.*, No. 97-826 (filed Nov. 17, 1997); *accord* Petition for a Writ of Certiorari at 3, *FCC v. Iowa Utils. Bd.*, No. 97-831 (filed Nov. 19, 1997). By granting review as to *every* issue presented by both the petitioners and the cross-petitioners in that case, this Court recognized the importance of even the seemingly routine administrative law

and statutory interpretation questions that have arisen in the context of this major enactment.

The question presented here is even more fundamental —both legally and practically—than those the Court agreed to decide in *Iowa Utilities Board*. The basic constitutional question whether Congress had the authority to enact the Special Provisions is, to say the least, a substantial one, as demonstrated by the split of opinion among the judges that have reviewed this case. And the practical import of that question is enormous. Under section 271, BOCs may not provide long distance services originating in an "in-region" State until they receive FCC approval. Proceedings under section 271 are currently on-going for virtually every State. To date, however, the FCC has rejected every single section 271 application, despite the Commission's frank acknowledgement that such relief would have enormous economic benefits for hundreds of millions of American consumers who are currently deprived of the competition that some of America's best-managed and largest telecommunications companies can bring to these important markets. By the estimate of one respected economist, BOC entry into the currently oligopolistic long distance market would result in consumer gains of as much as "$24 billion annually or $300 billion in present value." [15]

In sum, this case poses a legal question of the first order in the context of a highly important statute that sets national policy in the exploding telecommunications field into the next millennium. It merits review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[15] Paul W. MacAvoy, *The Failure of Antitrust and Regulation To Establish Competition in Long-Distance Telephone Services* 185-86 (1996). Before the Fifth Circuit, five States filed an amicus brief detailing how "[t]he Special Provisions hinder competition and harm consumers." Amicus Curiae Brief of Texas, Arkansas, Mississippi, South Carolina, and South Dakota at 4 (5th Cir. filed Apr. 21, 1998).

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